

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In the Application of
Michael Popovsky *et al.*
Serial No. 10/696,069
Filed: October 28, 2003
For: Cleansing Pad

: Group Art Unit 3723
: Examiner Chin
:
:

MS Amendment
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

1.132 Affidavit of Michael Popovsky

I, Michael Popovsky, depose and say:

1. I am the co-inventor of US Patent Application Serial No. 10/696,069 and submit this declaration pursuant to 37 C.F.R. § 1.132 for consideration by the US Patent and Trademark Office in connection with this application.

2. In connection with this Affidavit, I have read US Patent No. 5,995,417 to Taylor as well as the Amendment and Request for Continued Examination dated May 15, 2007.

3. I understand the Taylor Patent to teach a cleansing product made by first creating a liquid cleansing composition in a solvent (water, alcohol or glycol) and then heating that liquid composition to a temperature above the boiling point of the solvent (to remove the solvent) and thereby create a solid waxy composition.

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4. Cleansing pads of the present invention are infused with a melted form of a solid cleansing agent, a pourable soap, that (i) melts when heated to a temperature of from about 120°F to about 160°F and (ii) solidifies in essentially the same form and composition when allowed to cool below 120°F. These cleansing pads are sold under the tradename Spongeables®.

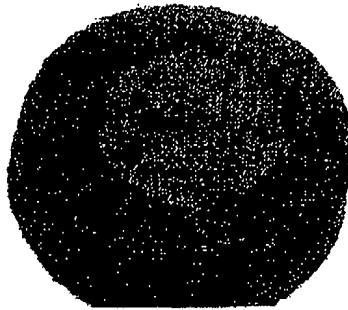
5. Heating the solid cleansing agent (pourable soap) used in Spongeables® to above 212°F (the temperature taught by Taylor as a necessary drying step) will negatively impact aesthetics, resulting in a product that is not commercially acceptable. Among other things, heating the pourable soap base above 170°F causes the soap to darken – rendering it cosmetically unappealing. Additionally, heating the pourable soap base above 170°F will undesirably change the fragrance characteristics.

6. By using a process in which a solid pourable soap is melted to a temperature of from about 120°F to about 160°F, infused into a sponge, and then allowed to cool, we have produced sponges that have a ratio of soap to sponge of greater than 10:1. The ratios for several commercial Spongeables® products are as follows:

	<u>Sponge</u>	<u>Sponge + Soap</u>	<u>Ratio</u>
DAISY	8 grams	100 grams	11.5
DUCKY (YELLOW)	8 grams	100 grams	11.5
3+ SQUARE	2 grams	60 grams	29.0
WHITE ROSE BAR	8 grams	120 grams	14.0
AMOEBA	4 grams	70 grams	16.5
PEDI SCRUB BUFFER	4 grams	90 grams	21.5

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7. Because of the ability to achieve soap:sponge loadings of at least 10:1, many Spongeables® products can be used for more than 30 baths or showers. A photograph of one such product as sold is attached:



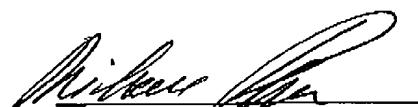
8. Attached are press clippings from Womens Wear Daily and Euromonitor describing the commercial success of Spongeables® products.

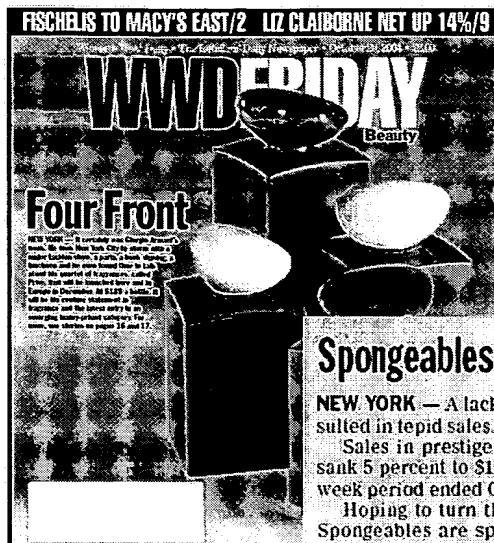
9. The foregoing statements are made of my own knowledge and are true. I have been warned that willful false statements and the like are punishable by fine or imprisonment, or both, and that such statements may jeopardize the validity of the application or any patent issuing thereon.

Further Affiant says not.

Dated:

5-15-08





Spongeables Aim to Soak Up Bath Sales

NEW YORK — A lack of innovation in the bath category has resulted in tepid sales.

Sales in prestige remained flat, while sales in mass doors sank 5 percent to \$152 million (excluding Wal-Mart) for the 52-week period ended Oct. 18, according to ACNielsen.

Hoping to turn the tide is a new line called Spongeables. Spongeables are sponges infused with natural glycerin and olive oil-based soap. The soap lasts for about 30 showers, according to Elaine Binder, executive vice president of SpongeTech Inc. "I found a way to create Spongeables because my five-year-old son was going through a lot of expensive shower gel and I thought there had to be a way to make soap last," said Binder.

Spongeables offer more than just soap in a sponge. The ingredients combine exfoliation, cleansing and massaging.

First produced last November, Spongeables have already been successful at upscale merchants such as Henri Bendel, Nordstrom, Marshall Field's and Saks Fifth Avenue. Specialty chains including Pure Beauty and Beauty First also picked up the sponges, which retail for \$15 for the 30-shower version or \$5 for a seven-shower travel size.

According to Binder, exposure through premium hotels such as The Venetian in Las Vegas has also helped build consumer interest. Industry sources estimate sales could exceed \$25 million within the next year.

The company upped its distribution capacity and is broadening distribution to include Ulta, Fred Meyer and Bristol Farms. Last June, Binder unveiled Spongeables to mass merchants at the National Association of Chain Drug Stores Marketplace meeting. Retailers singled out the line as one of the show's standout items.

"Spongeables was one of the most unique products at that show," said Kathy Vanek, category manager for Snyder's Drug in Minnetonka, Minn.

She especially liked the fact that the sponges can be cut into playful shapes for children. Also, there are many scents, including lavender, fig, grapefruit and jasmine. According to Binder, the soaps can be produced for proprietary labels.

While the bath category has been challenging for many retailers, the accessory portion of sales has helped boost margins. What retailers also like about Spongeables is the combination of being a soap and a loofah. Spongeables are merchandised in a variety of vehicles including an inline display and a floor stand.

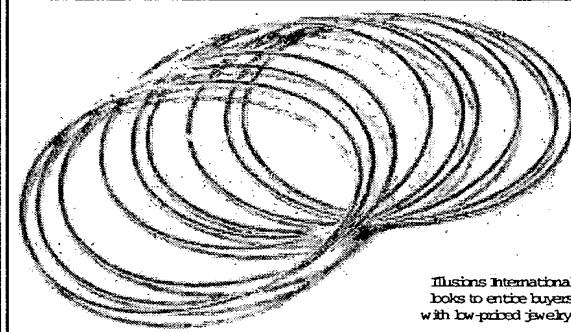
Critical Mass By Faye Brookman

ECRM: Showcase for Fierce Competition

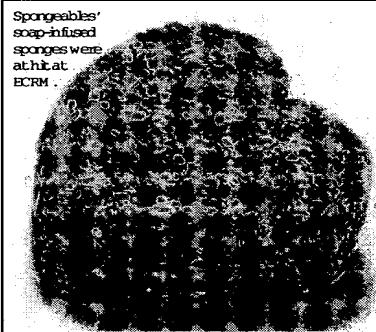
PHOTO BY STEPHEN SULLIVAN



A revamped Sarah Michaels will hit drugstores this spring.



Illusions International looks to entice buyers with low-priced jewelry.



Spongeables' soap-infused sponges were at hit at ECRM.

By Molly Prior and Andrea Nagel

SAN FRANCISCO — Love was in the air at the ECRM Cosmetics, Fragrance and Bath Conference held here this week, as several companies hooked up and announced acquisition deals.

Two years after buying former AM Cosmetics brands — namely *Eye'n'Wlid*, *Tropeze* and *Black Radiance* — *Markwins International Corp.* has scouted out a new cosmetics company, *Soho Cosmetics*, to add to its brand portfolio.

Soho Cosmetics, a Montreal-based company, surfaced in the Canadian market two years ago and specializes in color cosmetics and cosmetics bags. Eric Chen, president and chief executive officer of *Markwins*, explained that the French-Canadian company will give *Markwins International Corp.* a foothold in the Canadian market by establishing a "well-seasoned operational base there." *Markwins* also has ambitions of introducing *Soho* as a full-scale revamp, of course — to the U.S. market. Chen said *Soho*'s high-fashion, avant-garde in age offers a point of difference among similarly priced mainstays, such as *L'Oréal* and *Revlon*, that use spokesmodels and glitzy marketing campaigns to create a look that duplicate brand positioning.

Soho's midpriced range will bring *Markwins*, which built its business by churning out value kits and budget brands, into a new tier. It also may soon give *Markwins* a strong footing in China, where domestic cosmetics consumption is growing at a rate of 22 percent annually. *Soho*, more so than the company's budget brands, would be best suited for the Asian market, explained Chen. The executive said the company expects to close the deal in March.

The move is part of the company's larger strategy to build a robust portfolio of beauty brands, noted Chen. Prior to acquiring the AM Cosmetics brands in 2003, the *Markwins* business relied on gift sets, such as color cosmetics kits and train cases, sold under the names *The Color Workshop*, *The Color Institute* and *ACT*.

"In order to build the company, we need to pursue brands," said one member of the *Markwins* team. He acknowledged that *Markwins* is looking to acquire domestic beauty brands, as well. As part of its international expansion plans, *Markwins* recently introduced its *Eye'n'Wlid* brand to the European market.

It is also circulated that *Pacific World Corp.*, owners of the *Nailene* brand, was close to acquiring fellow artificial-nail manufacturer *Fing'rs*. According to a buyer who met with the company, the *Pacific World* meeting room showcased a smattering of *Fing'rs* products.

Talk at the show, brimming with specialty bath players, also centered on the growing glut of no-name imports from China. Wal-Mart's holiday assortment relied heavily on such imports last year. For manufacturers that hope to do business with Wal-Mart, it is best to have the capability to ship their wares directly from China to the retailer's distribution centers, according to several vendors at the show. Last holiday, RLD International, the U.S. arm of a Chinese manufacturer, helped Wal-Mart trim the costs of its bath sets even further by excluding added extras, such as decorative ribbons.

Pat Gann, director of product development of RLD, admitted that the strategy of using a China-based manufacturer and shipping direct to Wal-Mart was "squeezing out" U.S.-based suppliers desperate to do

business with Wal-Mart. "They just can't compete," she said. For Holiday 2005, Gann's *Landy International* division is supplying Wal-Mart with more bath gift sets, which range from the traditional, featuring angels and gold accents, to more retro designs with black and pink color themes. Gann said the bulk of Wal-Mart's orders were in the \$2.88 retail price range, but there were also orders for \$6 to \$8 bath gift sets, as well.

Driving sales of specialty bath products, which include items by Coty's *The Healing Garden*, have prompted several retailers to shrink the space they devote to the category, in favor of allocating it to high-ticket skin care products. Woodridge Labs — a niche-focused company known for its nimbleness in bringing new products like its *Vita-K Solution Microderm-abrasion Kit* to drugstores — got retailers' attention this week by introducing a \$40 wrinkle-fighting cream called *Derm aFreeze 365*. The product seeks to mimic the formula of *Freeze 24-7*, a skin cream that sells at specialty retailers like *Sephora* for \$95. Woodridge president and CEO Joe Millin, who rubs the cream into his forehead in front of retail buyers so they can watch

the product take effect, said *Derm aFreeze* is designed to reduce the appearance of wrinkles in 10 minutes.

The product, which breaks another price barrier in mass skin care, will roll out to seven retail accounts in April. Woodridge will back *Derm aFreeze* with \$1 million in media support during the month of May alone.

Several specialty bath manufacturers are following *The Healing Garden's* new limited approach to the category by infusing their product formulas with skin care benefits. Some of the new launches, from brands such as the made-over *Sarah Michaels*, teeter on the edge of serious skin care with introductions such as anti-cellulite treatments.

Sarah Michaels' new owner Commonwealth Soap & Toiletries Co. Inc., which bought the company from The Hatch Group last year, recruited former Duane Reade beauty buyer Karen Durham to create an entirely new look and brand positioning for the bath line. Durham, who now runs her own consulting firm, Marketing Specialists, Inc., is credited with creating Duane Reade's proprietary beauty brand *Apt. 5*.

Continued on page 18

Top 10 Newsmakers at ECRM

1. *Markwins International Corp.* acquires *Soho Cosmetics*, a Canadian-based maker of color cosmetics and cosmetics bags, for an undisclosed amount of cash and interest. The deal looks to immediately expand *Markwins'* distribution in Canada as well as introduce a new midpriced cosmetics brand to the U.S. market, which the company expects to relaunch in the next six months.

2. *Pacific World Corp.* is expected to acquire *Fing'rs*, giving it another brand in the artificial-nail category, in addition to *Nailene* and *Revlon Artificial*.

3. *J.C. Penney* has hired a new bath and body buyer, Mary Richner, after the post remained open for five months. Richner has served as the fragrance buyer for Federated Department Stores in Atlanta; the vice president, general merchandising manager for cosmetics at *Mercantile Stores*, and the senior vice president, marketing and merchandising at *Ulta*. The move signals that the retailer is indeed serious about reentering the beauty category.

4. Julie Adams is named to Duane Reade's beauty department. Her role at the regional retailer is still being ironed out, but two positions remain open within the division, hosiery buyer and skin care buyer.

5. Specialty bath is losing space to skin care items, and in turn, new bath items are infusing skin care benefits in their formulas. Manufacturing in China — and shipping directly — gives companies a distinct advantage in doing business with Wal-Mart. The China trend is "squeezing out" small U.S. bath suppliers who can't offer the behemoth its required margins and low price points.

6. Competition in the value sector of cosmetics has reached an all-time high with the addition of *Ten Beauty* by *Smart Brands* and *Jane Cosmetics*.

7. Hot show items according to buyers: P&G's new *Cover Girl* line targeting older women and utilizing the Olay brand on packages; a woman's version of *Spirit Antonio Banderas*; *Sarah Michaels'* new skin care-focused bath line; *DeLabs' Opal nail line*; *Spongeables'* soap-infused body sponges; *Illusions'* rotating jewelry display, and *Solar Cosmetics' Green Leaf Spa* line.

8. Woodbridge Labs' *Derm aFreeze 365* will bring a \$40 price point to drugstores' skin care shelves this spring, breaking the \$35 ceiling currently held by *Avene* and *Vichy* in *Brooks Pharmacy*.

9. Hot 2005 trends: anti-cellulite products; 3-in-1 products, and nail in plasters.

10. ECRM news: Buyers complained that the four-day, 10-hour-per-day beauty show was extremely taxing with too many suppliers to see in such a short period of time; the Expo Hall, which was specially created to accommodate an overflow of vendors, was a bomb with few retailers taking the time to meet them; and ECRM is hosting its first Hispanic show this October in Miami, to include the beauty, food and general merchandise categories.





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Group Art Unit 3723
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Commissioner for Patents
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1.132 Affidavit of Stephen Herman

I, Stephen Herman, depose and say:

1. I have prepared this Affidavit so that it may be considered by the US Patent and Trademark Office in connection with the examination of US Patent Application Serial No. 10/696,069 entitled "Cleansing Pad."

2. I received a Bachelor of Science in Physics from Stevens Institute of Technology and a Masters of Science in Chemistry from Fairleigh Dickinson University ("FDU").

3. I have over 30 years experience in the cosmetic and fragrance industry and was elected a Fellow of the US Society of Cosmetic Chemists in 2002. For over fifteen years, I have written and taught about fragrances and cosmetic formulation. Since 1993, I have been an Adjunct Professor in FDU's Masters in Cosmetic Science program, teaching cosmetic formulation lab and

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perfumery courses. I am the author of *Fragrance Applications: A Survival Guide* (Allured 2002) as well as book chapters and articles on fragrance and olfaction. Since August 1998, I have been a columnist for the cosmetics industry magazine, *Global Cosmetics Industry*.

4. Fragrances are comprised of individual notes – commonly classified as top, middle and bottom. The combination of individual notes – usually top, middle and bottom – create an accord, a unified olfactory impression.

5. Fragrance components, especially top notes, are volatile. They are also highly temperature sensitive and can be denatured by heat. Starting temperatures of greater than about 160°F, notes will degrade and accords will change.

6. In connection with this Affidavit, I have read US Patent Application Serial No. 10/696,069 (Publication No. 2005/0000046), US Patent Application Serial No. 10/562,311 (Publication No. 2006/0282966), the amendments to the claims in Application 10/696,069 made on June 5, 2007, the Office Action mailed on November 16, 2007, as well as US Patent No. 5,995,417 to Taylor.

7. I understand that in connection with Applicants response to the Office Action mailed on November 16, 2007 that claim 12 of Application 10/696,069 has been amended to read as follows: The cleansing pad of claim 1 wherein

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the solid cleansing agent pourable soap distributed substantially throughout the pad contains one or more fragrances.

8. The Taylor Patent teaches a process for making a cleansing pad in which a liquid blend cleansing composition (surfactants, hydrotrope, alkali agent and solvent) is heated above the boiling point of the solvent. Heating drives off the solvent in which the cleansing composition ingredients are admixed and produces a solid waxy composition.

9. In the case of water, the preferred solvent taught in the Taylor patent, the liquid blend cleansing composition is heated to temperatures of over 212°F, preferably in excess of 280°F.

10. The Taylor patent also teaches forming a solid waxy cleansing composition by heating a liquid blend in which glycols or alcohols are used as the solvent. The boiling points of alcohols and glycols commonly-used in formulating personal care products, including fragranced soaps, are listed below:

<u>Solvent</u>	<u>BP (°F)</u>
Alcohol - ethyl	172.4
Alcohol - propyl	207
Alcohol - butyl-n	243
Ethylene Glycol	386
Propylene Glycol	368

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11. Given the temperature-sensitive nature of fragrance ingredients, a person having ordinary skill in the art would not use a process of the type taught by Taylor – namely, a process which heats a liquid blend to temperatures of over 212°F – to make a fragranced soap-infused sponge.

12. The cleansing pad according to amended claim 12 of Application Serial No. 10/696,069 (as set out in Paragraph 7 of this Affidavit) could not be made by the process described in the Taylor patent since heating to temperatures above 200°F would destroy the intended fragrance characteristics of the final product.

Further Affiant says not.

Dated:

5/15/2008

Stephen Herman

Stephen Herman
38 Hillside Drive
Totowa NJ 07512